NO. 46825-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL FLETCHER
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON GRAYS HARBOR
The Honorable Mark McCauley, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Fletcher's current failure to register as a sex offender is not a sex offense because the current crime requires a prior violation of RCW 9A.44.132, and Fletcher has never been convicted under this provision.

Issue Presented on Appeal

Where Fletcher has never been convicted of a "sex offense" as defined under RCW 9A.44.132, can his current offense be considered a "sex offense" where this is an essential element under defining a sex offense.

B. STATEMENT OF THE CASE-PROCEDURAL

Mr. Fletcher was charged under RCW 9A.44.132(1)(a). That statute was enacted in 2010 and became effective June 1, 2010. RCW 9A.44.132. Prior to the enactment of these statutes in June 2010, failure to register as a sex offender was charged under RCW 9A.44.030. After June 10, 2010, the charging statute became RCW 9A.44. 132. This new statute enumerated the punishment applicable to violations of RCW 9A.44. 130 as a class C felony.

C. SUPPLEMENTAL ARGUMENT

FLETCHER'S CURRENT FAILURE TO

REGISTER AS A SEX OFFENDER IS NOT A SEX OFFENSE UNDER THE CURRENT STATUTORY SCHEME, THUS HIS CURRENT CONVICTION IS NOT A FELONY CONVICTION.

Fletcher's current failure to register is not a sex offense because he it requires a prior conviction under RCW 9A.44.32 and the current conviction is his first conviction under this statute.

Court's use principles of statutory interpretation "to determine and give effect to the intent of the legislature." *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013). This court reviews questions of statutory construction de novo. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). To determine legislative intent, the Court first examines the plain language of the statute considering the text of the provision in question, the context of the statute, and the statutory scheme as a whole. *Evans*, 177 Wn.2d at 192. The plain and ordinary meaning applies to undefined terms unless a contrary legislative intent is indicated. *Ervin,* 169 Wnn.2d at 820.

If the plain language of the statute is susceptible to more than one reasonable interpretation, the statute is ambiguous. Id. The Court first attempts to resolve the ambiguity and determine the legislature's intent by resorting to other indicia of legislative intent, including principles of

statutory construction, legislative history, and relevant case law. Id.

If these indications of legislative intent are insufficient to resolve the ambiguity, under the rule of lenity the Court must interpret the ambiguous statute in favor of the defendant. *Evans*, 177 Wn.2d at 192-93. RCW 9.94A.030 sets forth the current definition of what constitutes a "sex offense." RCW 9.94A.030(46)(a)(i) and (v) specifically define a sex offense for purposes herein. Subsection (a)(i) defines a sex offense as "[a] violation of chapter 9A.44 RCW other than RCW 9A.44.132 " RCW 9.94A.030(46)(a)(i). Subsection (a)(v) defines a sex offense as "[a] felony violation of RCW 9A.44.132(1) (failure to register) if the person has been convicted of violating RCW 9A.44. 132(1) (failure to register) on at least one prior occasion." RCW 9.94A.030(46)(a)(v).

After examination of the definition of a sex offense in RCW 9.94A.030 from 1981 to 2010, Failure to Register as a Sex Offender was not considered a sex offense until RCW 9A.44.132 was enacted in 2010. Under the current version of RCW 9.94A.030 which became effective in June 2011, failure to Register as a Sex Offender was first categorized as a sex offense in 2011 under RCW 9A.44. 132. See WA Legis 274 (2010); WA Legis 87 (2011).

Based upon the foregoing, the current failure to register as a sex offender is not a sex offense because Mr. Fletcher has not previously been convicted of a sex offense under RCW 9A.44. 132, even though Mr. Fletcher has been convicted of Failure to Register as a Sex Offender on four prior occasions (prior convictions occurred in 2005 and 2006, prior to the enactment of RCW 9A.44. 132(1) (a)).

There is no ambiguity in these statutes because the legislature chose not to include former RCW 9A.44.130 in the current definition of sex offense. RCW 9A.44.132. RCW 9.94A.030(46). For many years, our Supreme Court has refused to compensate for legislative drafting errors. *McKay v. Department of Labor & Indus.*, 180 Wash. 191, 194, 39 P.2d 997 (1934); *State v. Taylor*, 97 Wn.2d 724, 649 P.2d 633 (1982).

For example, in *Taylor* during the same legislative session, the legislature passed a law defining felony flight as a new offense. Later, the legislature passed a statute decriminalizing traffic-related offenses. The decriminalization statute contained a list of exemptions but the list did not include felony flight. Taylor appealed the denial of his motion to dismiss a felony flight charge against him because it had been decriminalized. The Court held that even if the Legislature had intended to include felony flight

in the list of exemptions, judicial restraint did not permit the courts to fill in the omission. *Taylor*, 97 Wn.2d at 728. *Citing,* the Court in *Taylor* reiterated:

> 'In construing a statute, it is safer always not to add to, or subtract from, the language of the statute unless imperatively required to make it a rational statute. More recently we have affirmed the contemporary value of this rule: This court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or an inadvertent omission. Jenkins v. Bellingham Municipal Court, 95 Wn.2d 574, 579, 627 P.2d 1316 91981).'

Taylor, 97 Wn.2d at 728.

There are two exceptions: the first involved conditions for the commitment of criminally insane which created a contradiction between contemporaneous commitment and release which undermined the entire purpose of the act. S*tate v. Brasel*, 28 Wn.App. 303, 309-10, 623 P.2d 696 (1981). The second involved an inadvertent legislative omission that did not undermine the purpose of the statute and judicial alteration of the statute was not needed to make it rational. *Taylo*r, 97 Wn.App. at 729. Neither apply in this case because RCW 9A.44.130 is rational without need to add missing language.

In a different case, *State v. Taylor*, 162 Wn.App. 791, 259 P.3d 289

(2011), the defendant was convicted of third degree statutory rape under former RCW 9A.44.090 (1979) in 1988. *Taylo*r, 162 Wn.App. at 793-94. However, the legislature repealed the statute under which he was convicted later that year. Laws of 1988, ch. 145, § 24; *Taylor*, 162 Wn.App. at 793-94. In 2009, the State charged Taylor with failure to register as a sex offender in violation of former RCW 9A.44.130 (2006), listing his predicate offense as the 1988 statutory rape conviction. *Taylor*, 162 Wn.App. at 794, n. 1. The trial court found him guilty as charged. *Taylor*, 162 Wn.App. at 794.

Division One of this court noted a significant gap in the Sentencing Reform Act of 1981(SRA)'s definition of "sex offense" in that it does not include offenses listed in chapter 9A.44 RCW that existed after 1976 but were thereafter repealed. *Taylor*, 162 Wn.App. at 799. *see also* RCW 9.94A.030(46). Recognizing that this gap was likely inadvertent, the court nevertheless declined to fill the gap in the absence of legislative authority. *Taylor*, 162 Wn.App. at 799. Because the predicate offense for Taylor's failure to register conviction was no longer a violation of the SRA, the court held that the failure to register statute did not include his statutory rape conviction as a sex offense. *Taylor*, 162 Wn.App. at 800-01. The

Court in *Taylor*, therefore, concluded that it was required to reverse his failure to register conviction. *Taylor*, 162 Wn.App. at 801.

Taylor is instructive. At the time Fletcher was convicted, he was required to register as a sex offender, but failure to register was not a sex offense at any time during any of his former failure to register offenses because the legislature had not enacted a provision defining failure to register as a sex offense until 2010. Similar to *Taylor*, the fact that the former failure to register convictions were not sex offenses, cannot now be judicially altered, this decision and action lies exclusively with the legislature.

The *Taylor* decision prohibits the courts from legislating form the bench to add a crime or punishment that either no longer exists or did not exist when the prior crimes were committed, even if the omission is inadvertent.

Here, Fletcher's prior failure to register offenses were not sex offenses when committed, therefore when Fletcher committed the current failure to register, he did not have any prior sex offenses to satisfy RCW 9A.44.132(1)(a). Accordingly, under *Taylor*, and the current statutory scheme, the current offense is not a sex offense because Fletcher has not

previously been convicted under RCW 9A.44.132. and for the past 20 years, RCW 9.94A.030 has not defined failure to register as a sex offense.

The state cited to *Jenkins v. Bellingham Municipal Court*, 95 Wn.2d 574, 627 P.2d 1316 (1981) and RCW 1.12.018 to support its argument that notwithstanding the omission from the current statute, this court should read the omission into the statute. (RCW 1.12.018 does not exist-presumably the state intended to cite to section RCW 1.12.028).

RCW 1.12.028 provides that " [i]f a statute refers to another statute of this state, the reference includes any amendments to the referenced statute unless a contrary intent is clearly expressed." RCW 1.12.028. RCW 9A.44.030(46) does not refer to former RCW 9A.44.130, therefore RCW 1.12.028 does not apply.

Mr. Fletcher requests this Court declare that the current offense is not a sex offense, which makes the current offense an unranked offense whereas a second offense becomes a class C felony. RCW 9A.44.132.

D. CONCLUSION

Mr. Fletcher respectfully requests this court deem his current failure to register not a class C sex offense, and remand for sentencing.

DATED this 8th day of April 2015

Respectfully submitted,

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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Grays Harbor County Prosecutor jwalker@co.grays-harbor.wa.us and Samuel Fletcher DOC # 83986 Coyote Ridge Corrections Center 1301 N Ephrata Ave PO Box 769 Connell, WA 99326 true copy of the document to which this certificate is affixed, on April 8, 2015. Service was made by electronically to the prosecutor and to Mr. Gipson by depositing in the mails of the United States of America, properly stamped and addressed.

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